No. 626

In the Supreme Court of the United States

OCTOBER TERM, 1960

HERMAN LIVERIGHT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 21–31) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1960 (Pet. App. 32). On July 13, 1960, Mr. Justice Black extended the time to file petition for a writ of certiorari to and including August 17, 1960, and the petition was filed on August 16, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Senate Resolution 366, 81st Cong., 2d Sess., is sufficiently clear to authorize the Internal Security Subcommittee to ask the questions which petitioner refused to answer.

2. Whether the Subcommittee was legally authorized to hold the particular hearing at which petitioner was questioned.

3. Whether the First Amendment protected petitioner in refusing to answer the questions.

4. Whether, at the time petitioner appeared before it, the Subcommittee was engaged in investigating a subject matter which was sufficiently identified and of which petitioner was adequately apprised.

5. Whether the indictment was invalid because it did not specify the subject under inquiry or the pertinency of the questions to that subject, and did not allege that petitioner's refusal to answer was wilful.

6. Whether petitioner had the right to a hearing to determine whether the Federal Government employees on the grand and petit jury were biased or was entitled to have all Federal Government employees on the petit jury disqualified.

7. Whether the rulings of the trial court denied petitioner the right of cross-examination and a fair trial.

8. Whether the pertinency of the questions is a matter of law to be decided by the trial court.

STATUTES AND RESOLUTION INVOLVED

Relevant portions of 2 U.S.C. 192, as amended; the Legislative Reorganization Act of (August 2,)

1946, c. 753, Title I, Sections 133, 134, 60 Stat. 831–832 (2 U.S.C. 190a, 190b); and Senate Resolution 366, 81st Cong., 2d Sess., are set forth in Appendix C to the petition, pages 33–35. In addition, Section 2 of the Resolution states:

> The committee, or any duly authorized subcommittee thereof, is authorized to sit and act at such places and times during the sessions, recesses, and adjourned periods of the Senate, to hold such hearings, to require by subpoenas or otherwise the attendance of such witnesses and the production of such books, papers and documents, to administer such oaths, to take such testimony, to procure such printing and binding, and within the amount appropriated therefor, to make such expenditures as it deems advisable. * * *

STATEMENT

Petitioner was charged in a fifteen-count indictment in the District Court for the District of Columbia with having refused, in violation of 2 U.S.C. 192, to answer fifteen questions, pertinent to the matter under inquiry, put to him by the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Committee on the Judiciary (J.A. 1–3). Upon a trial by jury, petitioner was found guilty on counts 1 through 14 (J.A. 134). Count 15 was dismissed (J.A. 126). Petitioner was sentenced by the district court to imprisonment for three months and to pay a fine of five hundred dollars (J.A. 12). The

judgment of the trial court was affirmed by the court of appeals.[1]

The pertinent facts may be summarized as follows:

In connection with its continuing investigation since 1951 into Communist subversion and the operation of the internal security laws (J.A. 89–90, 92), the Subcommittee, on June 28 and 29, 1955, heard Winston Burdett, a newspaperman and broadcaster, who had been a member of the Communist Party from 1937 until the early 1940's, testify concerning Communist infiltration of communications media (J.A. 87). He stated that, after he had become a Party member, Party leaders had induced him to become a foreign correspondent for a major American newspaper and to use that position as a cover for military espionage for the Soviet Union. Subsequently, the Subcommittee convened hearings to explore matters stemming from Mr. Burdett's testimony (J.A. 88).

Robert Morris, the chief counsel of the Subcommittee, testified that prior to calling petitioner the Subcommittee had information that he had been active in Communist activities in New York and subsequently had been transferred with orders to carry on Party activities in New Orleans. According to this information, petitioner moved to New Orleans for the

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[1] The court of appeals delayed argument and determination of this case, along with seven other contempt-of-Congress cases, until after this Court's decision in *Barenblatt* v. *United States*, 360 U.S. 109. Petitions for certiorari have been filed in all six cases in which the convictions were affirmed. See the Government's Brief in Opposition in *Deutch* v. *United States*, No. 233, this Term, pp. 8–9.

purpose of becoming active in and ultimately taking over the direction of the professional branch, which was an underground operation of the Party. One of the addresses in New Orleans where petitioner resided was 333 Ware Street, and the Subcommittee had learned that secret Communist activities were held at that address (J.S. 75–81). After petitioner had gone to New Orleans, the Communist leadership cautioned petitioner to stay away from open Communist activities (J.A. 80–81). The Subcommittee knew that petitioner and his wife had rented a post office box in White Plains, New York, under the name of Westchester County Committee for Ethel and Julius Rosenberg, which was part of a fund-raising drive in behalf of two Communists who had been convicted and sentenced to death for violation of the Espionage Act. It was also known that this committee was raising money for Communist purposes in addition to the purpose of defense funds for the Rosenbergs (J.A. 79–81). The Subcommittee also had information that the petitioner had been a Party member shortly before he appeared before it (J.A. 77); that petitioner had subscribed to Communist Party nominating petitions (J.A. 75–76); that he had contributed money to the Communist Party (J.A. 79); and that he had been membership director of the Thomson-Hill Branch of the Party in 1943 (J.A. 76–77).

On the basis of this information, a subpoena was served on petitioner to appear before the Subcommittee on March 19, 1956. Prior to his appearance,

petitioner's counsel, Philip Wittenberg, a New York attorney with experience in the field of civil liberties (J.A. 81–82), telephoned the Subcommittee counsel, Mr. Morris, and asked about the scope of the inquiry. Mr. Wittenberg was informed in general terms by Mr. Morris as to the scope of the inquiry, without relating the specific evidence possessed by the Subcommittee (J.A. 67–71). Mr. Wittenberg, according to Mr. Morris, did not challenge the Subcommittee's authority, but "indicated that he knew the work of the Internal Security Subcommittee and what we were trying to do" (J.A. 69–70) and "then became specific when he said he knew what problems I would have on internal security" (J.A. 71).

Petitioner appeared with his counsel before the Subcommittee on March 19, 1956, first in executive session and then (following a recess) in a public session. At the executive session, petitioner initially disclosed his identity, occupation, and his address for the previous two years as 2239 General Taylor Street in New Orleans (J.A. 18). He denied, after consulting counsel, that Communists had been meeting at his home, but declined to state whether he was then an active Communist or whether he had been membership director at the Party's Thomson-Hill branch in 1943 (counts 1, 2) (J.A. 19–20). Petitioner refused to answer these questions on the basis of a lengthy legal memorandum, which he submitted to the Subcommittee (J.A. 41–50). Petitioner's main objection was that the Subcommittee was invading "my political beliefs, any other personal and private affairs, and my associ-

ational activities" protected by the First Amendment (J.A. 41–42). His remaining objectives were based on the separation of powers and the bill of attainder clause of the Constitution (J.A. 46–50). Petitioner expressly disclaimed any reliance on the Fifth Amendment (J.A. 20).

After petitioner's refusal to answer the two questions, he was temporarily excused (J.A. 21). The Subcommittee then decided to take further testimony from petitioner in a public session, since it was hoped that this might lead petitioner to change his mind (J.A. 105–106). About an hour and fifteen minutes later, petitioner, with his counsel, was called before the Subcommittee in public session. He was then advised by Mr. Morris (J.A. 21–22):

> Mr. Chairman, before commencing the interrogation of this particular witness, I would like to restate again for the record the purpose of the particular series of hearings being held by the Internal Security Subcommittee. I read now from the opening statement of the chairman:
>
> "We shall try to determine to what extent Soviet power operates through the Communist Party here and to what extent other organizations have been devised to effectuate its purposes. We shall study the structural revisions that the Communists have made in their network in order to avoid detection, and endeavor to trace the movement of individual agents through these changing structures."
>
> "Under consideration during these hearings will be the activities of Soviet agents and agen-

cies registered with the Department of Justice and such other agents or agencies not now registered whose activities may warrant legislative action."

"We shall endeavor to determine to what extent this Soviet activity here is calculated to contribute to Soviet expansion abroad and to what extent it is working to undermine the structure and composition of our own Government here, as the facts bearing on these issues are gathered in the public record of this subcommittee which will enable it to make recommendations or determinations as to whether the Internal Security Act of 1950 and other existing law should be repealed, amended or revised, or new laws enacted."

This witness is being called here this afternoon, Senator, in the course of that particular set or series of hearings.

Petitioner described his duties as television program director for a television station in New Orleans, as well as his previous employment in New York City and elsewhere (J.A. 22–32). The Subcommittee counsel, Mr. Morris, then stated (J.A. 32):

Mr. Chairman, this committee has been informed that Mr. Liveright and his wife were active in the Communist Party of New York City, and that at the time and date they moved to the South, they were formally asked by their Communist Party superiors to keep away from formal associations with the Communist Party at that time in their activities.

* * * * *

The purpose of subpoenaing this witness and asking him the following questions is to deter-

> mine to what extent Mr. Liveright's activities have been carried out in New Orleans in the framework of the Communist Party and to what extent they have been carried out in some other framework.

Petitioner refused, even after being ordered by the Chairman, to answer whether he was then or had ever been a Communist (counts 3, 4) (J.A. 32–33). His refusals were based on the written memorandum previously submitted to the Subcommittee. Petitioner also refused to answer a series of other questions on the basis of this same memorandum (counts 5–14) (J.A. 33–40).

ARGUMENT

1. Petitioner contends (Pet. 7–9) that "the grant of authority to the [Subcommittee] is so vague as to invalidate the Subcommittee's power to compel testimony in the First Amendment area." This contention is without substance.

In our Brief in Opposition (pp. 9–12) in *Whitman* v. *United States*, No. 300, this Term, pending on petition for a writ of certiorari, we have shown that Senate Resolution 366, 81st Cong., 2d Sess., is sufficiently clear—particularly when considered with its legislative gloss—to authorize the Internal Security Subcommittee to investigate Communist infiltration of the press. Similarly, this investigation of Communist activity in the United States as a whole was authorized. Before petitioner's testimony at the public session, Subcommittee counsel read the opening statement of the Chairman stating that the purpose of the hearing was to determine (1) "whether the Inter-

nal Security Act of 1950 and [(2)] other existing law should be repealed, amended or revised, or new laws enacted" and (3) "to what extent Soviet power operates through the Communist Party here" and "to what extent this Soviet activity here is calculated to contribute to Soviet expansion abroad" (see the Statement, *supra*, pp. 7–8). These three topics correspond almost precisely to the three subjects the Subcommittee is authorized by S. Res. 366 to investigate: (1) the administration, operation and enforcement of the Internal Security Act and (2) of other laws relating to internal security; and (3) "the extent, nature, and effects of subversive activities in the United States * * * including * * * infiltration by persons who are or may be under the domination of the foreign government or organization controlling the world Communist movement * * *" (see Pet. App. 34–35). And even if the resolution were not itself clear, the legislative gloss placed on the resolution before petitioner appeared—the holding of repeated hearings by the Subcommittee on this subject, the report of these hearings to Congress, and the repeated appropriation of money to the Subcommittee by Congress based on these reports—shows that the hearing involved here was well within the scope and meaning of the resolution. See *Barenblatt* v. *United States*, 360 U.S. 109, 117–120. As this Court held in *Barenblatt* with regard to the House Committee on Un-American Activities, "In light of this long and illuminating history it can hardly be seriously argued that the investigation of Communist activities gener-

ally, and the attendant use of compulsory process, was beyond the purview of the Committee's intended authority * * *." 360 U.S. at 121.

2. Petitioner asserts (Pet. 16–17) that the Subcommittee, when petitioner appeared before it, was not a competent tribunal because the Legislative Reorganization Act of 1946 (see Pet. 33–34) provides (1) that "[n]o standing committee of the Senate * * * shall sit, without special leave, while the Senate * * * is in session" and (2) that all hearings conducted by Senate committees "shall be open to the public, except executive sessions for marking up bills, or for voting or where the committee by a majority vote orders an executive session." But neither of these contentions is available to petitioner since he made no objection to the constitution of the Subcommittee at the time he was called before it. *United States* v. *Bryan*, 339 U.S. 323, 330–335; *Emspak* v. *United States*, 203 F. 2d 54 (C.A. D.C.), reversed on other grounds, 349 U.S. 190. If petitioner had made at that time the objections he subsequently raised at his trial, the Subcommittee could easily have satisfied them. "To deny the Committee the opportunity to consider the objection or remedy is in itself a contempt of its authority and an obstruction of its processes." *United States* v. *Bryan*, *supra*, 339 U.S. at 333.

In any event, petitioner's contentions are without merit. Section 2 of S. Res. 366, 81st Cong., 2d Sess. (*supra*, p. 3), passed in 1950, expressly provides that the Committee on the Judiciary, "or any duly authorized subcommittee thereof, is authorized to sit and act

at such places and times during the sessions * * * of the Senate * * * as it deems advisable."'[3] And while it appears that the executive session was not authorized by majority vote (J.A. 96), only counts 1 and 2 arose from questions asked during this session. Since counts 3 through 14 arose from questions asked at the public session, and since petitioner was given a general sentence which was less than he could have received on each count, his conviction must be affirmed if any count is valid. *Barenblatt* v. *United States*, *supra*, 360 U.S. at 126, fn. 25.

3. Petitioner argues (Pet. 2, 13–15, 17–18) that his rights under the First Amendment were violated because the Subcommittee was investigating Communist infiltration of communications, newspapers, and education, the government did not show probable cause for compelling petitioner to testify, and the government failed to show why petitioner's right of privacy must be subordinated to governmental interests. Application, however, of the rulings of this Court in *Barenblatt* to the facts of this case demonstrates that petitioner's claims cannot be sustained.

First, *Barenblatt* decided that congressional committees can investigate Communist infiltration of education, an area likewise protected by the First Amendment. It therefore follows that the Subcommittee's

[3] In addition, it seems doubtful that the provision of the Legislative Reorganization Act, unlike a requirement that a quorum be present, was intended to protect the rights of a witness. Rather, the purpose of the provision was apparently to assist Congress in securing the attendance of members at legislative sessions.

investigation of the Communist infiltration of communications is not constitutionally prohibited. Second, the Court suggested in *Barenblatt* that congressional committees cannot engage in "indiscriminate dragnet procedures, lacking in probable cause for belief that [the witness] possessed information which might be helpful to the Subcommittee." 360 U.S. at 134. But the evidence in this case shows that, before petitioner was subpoenaed, the Subcommittee had considerable information as to petitioner's active participation in Party activities and some of this information was conveyed to petitioner during his appearance before the Subcommittee (see the Statement, *supra*, pp. 4–5, 8). Certainly, the Subcommittee had probable cause to believe that petitioner could contribute substantially to the investigation. And, lastly, the Subcommittee's knowledge (see the Statement, *supra*, p. 4) of serious Communist infiltration of communications media, coupled with its probable cause for belief that petitioner possessed information on this subject, clearly justifies the same conclusion this Court found in *Barenblatt*—that "the balance between the individual and the governmental interests here at stake must be struck in favor of the latter, and * * * therefore the provisions of the First Amendment have not been offended." 360 U.S. at 134.

4. Petitioner argues (Pet. 9–13) that the Subcommittee was not, at the time he appeared before it, engaged in a subject under inquiry which was sufficiently identified and of which he was adequately apprised.

a. Petitioner, however, failed to object to the questions asked on the grounds of pertinency when he appeared before the Subcommittee. Rather, his lengthy statement of legal argument and authorities (J.A. 41–50), which was obviously prepared by or at least with the help of petitioner's counsel, justifies his refusal to answer entirely on the basis of various constitutional grounds (see the Statement, *supra*, pp. 6–7). The only suggestion of an objection to pertinency is the statement that petitioner "might wish to * * * challenge the pertinency of the question to the investigation" (J.A. 48). Considering the same statement in a substantially similar legal memorandum,[3] this Court, in *Barenblatt*, 360 U.S. at 124, held that the issue of pertinency is not properly raised by statements of a witness which "constituted but a contemplated objection to questions still unasked, and buried as they were in the context of [the witness'] general challenge to the power of the Subcommittee * * *." Therefore, here, as in *Barenblatt*, the witness failed "to trigger what would have been the Subcommittee's reciprocal obligation" to explain the pertinency of the questions, and the witness is foreclosed from raising the issue for the first time in the contempt proceeding. *Ibid.*

b. On the record in this case no reasonable man in petitioner's situation—and certainly not one as articulate and intelligent as petitioner, who was represented by experienced counsel—could have had any

[3] See page 234 of the Record in *Barenblatt* v. *United States*, No. 35, Oct. Term, 1958.

real doubt as to the "topic under inquiry." Before he appeared, the counsel who represented him at the hearing had telephoned counsel for the Subcommittee and was informed in general terms as to the subject matter of the inquiry; and petitioner's counsel had indicated that he understood.[4] At the brief executive session on March 19, 1956, petitioner himself presented a written statement of objections which revealed that he understood that the Subcommittee was going to inquire about his "political beliefs" and his "associational activities" (J.A. 41–42).

Any doubt in petitioner's mind concerning the subject under inquiry was surely cleared up when the Subcommittee counsel read to petitioner the opening statement of the Chairman at the public session in regard to "the purpose of the particular series of hearings" (J.A. 21). Included in the statement were these specific remarks (J.A. 22):

> We shall try to determine to what extent Soviet power operates through the Communist Party here and to what extent other organizations have been devised to effectuate its purposes. We shall study the structural revisions that the Communists have made in their network in order to avoid detection, and endeavor to trace the movements of individual agents through these changing structures.
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> * * * * *

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[4] In the conversation, petitioner's counsel "indicated that he knew the work of the Internal Security Subcommittee and what we were trying to do" (J.A. 70; see the Statement, *supra*, p. 6).

> We shall endeavor to determine to what extent this Soviet activity here is calculated to contribute to Soviet expansion abroad and to what extent it is working to undermine the structure and the composition of our own Government here [in order to enable the Subcommittee to make recommendations] whether the Internal Security Act of 1950 * * * should be repealed, amended or revised, or new laws enacted."[8]

Subcommittee counsel then told petitioner that the Subcommittee's purpose in questioning him "is to determine to what extent [his] activities have been carried out in New Orleans in the framework of the Communist Party" (J.A. 32). When petitioner refused to answer whether he was then or had ever been a Communist, (counts 3 and 4), the Chairman explained (J.A. 33):

> The question, Mr. Liveright, is very pertinent. We are attempting to see what amendments are needed to the Internal Security Act. In addition, and as a part of that, we are tracing the activities of the Communist Party in the United States.
>
> Our information is, sir, that you were sent South and placed there with your wife on a mission for the Communist Party, and were told by

[8] As we have shown (pp. 9–10), this statement, in effect, says that the subject under inquiry is the full extent of the Subcommittee's authority under Senate Resolution 366. The statements of the Subcommittee counsel and the Assistant United States attorney at petitioner's trial which petitioner quotes (Pet. 11) are to the same effect.

> your superiors not to become involved with a Communist cell that was a professional group in the city of New Orleans, but the word was used by your superiors to stay clean.

Similarly, after the Chairman stated that the Committee was desirous to know "how this conspiracy is financed," petitioner was asked and he refused to answer whether he had given money to the Communist Party (count 9) (J.A. 36). In sum, it is difficult to see how the "topic under inquiry" and the relevance to that topic of the questions asked could have been made much clearer.

Petitioner suggests (Pet. 10–11) that the subject under inquiry stated by the Chairman was too broad. But neither *Barenblatt* nor *Watkins* v. *United States*, 354 U.S. 178, suggests that congressional committees must divide their investigations into various topics, each to be investigated at a separate hearing. Such a requirement would seriously interfere with the work of the committees, particularly when, as here, a committee is attempting to follow up the extensive testimony of an earlier witness (see J.A. 88). In such instances, it may be very difficult for the committee to designate a particular hearing as, for example, Communist infiltration of the radio or of the press.

5. Petitioner contends (Pet. 18–19) that the indictment was invalid because (a) it failed to specify the subject under inquiry or the pertinency of the questions and (b) did not allege that petitioner's refusal to answer was wilful.

a. The indictment stated simply, in the words of the statute, that the defendant unlawfully refused to answer "questions which were pertinent to the question then under inquiry" (J.A. 1). As we have shown in our Brief in Opposition (pp. 8–10) in *Russell* v. *United States*, No. 239, this Term, pending on petition for a writ of certiorari, this form of indictment—simply charging the defendant in the statutory language—is supported by substantial judicial authority. Moreover, petitioner was not compelled by the general obligation of the indictment to guess as to the subject under inquiry or the pertinency of the questions since this was fully explained to petitioner when he appeared before the Subcommittee (*supra*, pp. 15–17). And if he was left in any doubt, he could have easily moved for a bill of particulars.

b. Petitioner's contention that the indictment must allege wilfulness has been repeatedly rejected. *United States* v. *Deutch*, 235 F. 2d 853 (C.A.D.C.); *Sacher* v. *United States*, 240 F. 2d 46, 53 (C.A.D.C.); *Barenblatt* v. *United States*, 240 F. 2d 875, 878 (C.A. D.C.), reversed on other grounds, 354 U.S. 930. While it is true that, where wilfulness is an element of the crime, that requirement cannot be ignored in the indictment, it is also true that the charge may include either that term or words of similar import. The allegation here that petitioner "unlawfully" refused to answer (J.A. 1) is sufficient to allege that the refusal was a "deliberate, intentional" one. *Quinn* v. *United States*, 349 U.S. 155, 165; see *Howenstine* v. *United States*, 263 Fed. 1, 4 (C.A. 9); *Finn* v. *United*

States, 256 F. 2d 304, 306 (C.A. 4); *United States* v. *Meyers*, 18 F.R.D. 299, 300 (E.D. N.Y.).

6. Petitioner further contends (Pet. 19) that he was denied the opportunity to show the bias of Federal Government employee jurors so as to have the indictment dismissed and to have such jurors on the petit jury excused. But as we have shown in our Brief in Opposition (pp. 5–8) in *Russell* v. *United States*, No. 239, this Term, a defendant is not entitled to a hearing with respect to grand jurors unless, at the least, his motion and accompanying affidavit allege specific, individual, and strong bias in particular grand jurors—allegations which he would ultimately have to prove to have the indictment dismissed. Petitioner, however, has alleged only opinions that there exists among government employees *in general* fear of loss of employment as security risks so as to make it likely that any individual government employee would be afraid to vote against the return of an indictment in any case connected with Communism.

As to the petit jurors, petitioner of course had an opportunity on *voir dire* to show specific bias on the part of particular government employees. His motion, however, which was denied (J.A. 10), asked for the disqualification of all employees. But this Court has held in *Dennis* v. *United States*, 339 U.S. 162, 168, 172, a case involving the most important leader of the Communist Party, that specific demonstration of bias and fear—not mere claims that the security program intimidated many government employees—was necessary to disqualify even a petit juror for cause.

7. Petitioner attacks (Pet. 13–15) the trial court's order quashing subpoenas directed at the Subcommittee's files and sustaining objections to his cross-examination of the Subcommittee's counsel as to the identity of a confidential informant and information in the Subcommittee's files (J.A. 8–9, 10, 50–53, 97–98, 100, 117). Petitioner reasons that these actions prevented him from showing that the Subcommittee did not have probable cause to call him before it (see *supra*, p. 13).

When the Court in *Barenblatt* referred to "dragnet procedures" and "probable cause," it did not suggest that the sufficiency of the information or reasons which cause a committee to call a witness should be subject to plenary judicial review.[6] Rather, we believe, the Court intended at most to require only that congressional committees present evidence showing the basis of their decision to subpoena the witness. See *Sacher* v. *United States*, 240 F. 2d 46, 50 (C.A.D.C), reversed on other grounds, 354 U.S. 930. Here the Subcommittee's counsel testified on both direct and cross-examination concerning the information possessed by the Subcommittee as to petitioner's Communist activities (J.A. 75–81, 97–100) and refused to disclose only the files of the Subcommittee and highly confidential information (J.A. 50–53, 97–

[6] Significantly, the language of the Fourth Amendment and the decisions of this Court suggest that the scope of the Amendment does not extend to subpoenas to testify, as contrasted to subpoenas *duces tecum*. See the Government's Brief in Opposition (pp. 10–11) in *Shelton* v. *United States*, No. 946, this Term.

100, 117). The evidence offered by the Subcommittee's counsel should be sufficient since the decision whether a witness is to be called must be mainly for the legislative body to make. To superimpose on a trial for contempt a full-scale trial of a committee's judgment would be an invasion of the prerogative of the legislature and a serious interference with Congressional investigations.[7] The permissible scope of a congressional investigation, which of necessity must proceed step by step, is not to be limited by the strict requirements of a criminal prosecution. *Barenblatt* v. *United States, supra,* 360 U.S. at 130–133.

8. Petitioner also argues (Pet. 16) that the trial court erred in determining the pertinency of the questions as a matter of law. This contention is without merit. See *Sinclair* v. *United States,* 279 U.S. 263, and the Government's Brief in Opposition (pp. 12–13) in *Russell* v. *United States,* No. 239, this Term. Moreover, the questions petitioner refused to answer (J.A. 2–3) on which he was convicted all involved his own Communist activity and were clearly pertinent to the subject under inquiry.[8]

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[7] On petitioner's argument, a committee could only enforce its directions to witnesses at the cost of revealing at the trial all the information it had, including the identity of confidential informants.

[8] Petitioner suggests (Pet. 19) that certiorari should be granted because several of the issues raised by his petition are now before the Court in *Wilkinson* v. *United States,* No. 37, this Term, certiorari granted, 362 U.S. 926, and *Braden* v. *United States,* No. 54, this Term, certiorari granted, 362 U.S. 960. Although several of the issues are in fact common to this case and the two pending cases, we submit that the earlier cases do not provide any basis for asking this Court to grant

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1960.

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the writ or even to withhold action. Two of the issues raised by petitioner—whether the indictment must specify the subject under inquiry and whether the question of pertinency should be decided by the jury—are also involved in *Braden*. But while we cannot, of course, be certain of the reasons why the Court granted certiorari in that case, we believe that these issues are without substance, being controlled by clear judicial precedent, and are distinctly subsidiary to the more serious issues involved in *Braden*. While the two pending cases raise the pertinency of the questions to the subject under inquiry (which is closely related to the question in this case whether the witness was apprised of the subject under inquiry) and alleged violations of the witness' First Amendment rights, determination of these issues, in view of this Court's holding in *Barenblatt* (see 360 U.S. at 123–124, 127–134), depends on the particular facts of each case.